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No. 17-494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC.,
AND NEWEGG, INC.,
Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of South Dakota

BRIEF OF THE AMERICAN BOOKSELLERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), be overruled?

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OTHER AUTHORITIES

Xinxin Li et al., *Price Dispersion and Loss-Leader Pricing: Evidence from the Online Book Industry*, 59 Mgmt. Sci. 1290 (2013), https://www.researchgate.net/publication/256030627_Price_Dispersion_and_Loss_Leader_Pricing_Evidence_from_the_Online_Book_Industry 10

INTEREST OF *AMICUS CURIAE*[1]

The American Booksellers Association ("ABA") is a 117-year-old national, not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA's core members are key participants in their communities' local economy and culture, and to assist them ABA creates relevant programs; provides education, information, business products, and services; and engages in public policy and industry advocacy. ABA actively supports and defends free speech and the First Amendment rights of all Americans. ABA represents more than 1,700 locally owned independent bookstores operating in more than 2,300 locations nationwide. Approximately 400 ABA member bookstores participate in an association-sponsored e-commerce program, IndieCommerce, through which they sell physical books, e-books, tickets to author events and other items, www.indiecommerce.com.

ABA has an interest in this case because its members, independent bookstores, are adversely affected by the physical-presence rule set forth in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Under *Quill*,

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[1] Pursuant to this Court's Rule 37.2(a), ABA states that both Petitioner and Respondents submitted blanket consents to *amicus* briefs. Those blanket consents were docketed more than 10 days before the due date of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

if a customer purchases a book from a bricks-and-mortar bookstore in a state with a sales tax, the bookstore is legally obligated to collect the tax. But if a customer purchases the same book from an online bookstore without a physical presence in that state, the online bookstore cannot be subjected to the same legal obligation—which means, in practical terms, that the customer will not pay sales tax. This artificial imbalance creates a powerful incentive for customers to buy books online rather than from their local bookstore, and as such, causes significant competitive harm to those bookstores. ABA therefore has a strong interest in this case, which holds the promise of restoring a level playing field and creating competitive balance between bricks-and-mortar and online bookstores.

SUMMARY OF ARGUMENT

The Court should overrule *Quill*. *Quill* is deeply harmful to bricks-and-mortar retail stores. *Quill* has yielded the notorious practice of "showrooming," where a customer browses in a bricks-and-mortar store, and then buys products online using a smartphone in order to avoid paying sales tax. That practice causes profound harm to independent bookstores, which have low profit margins in the best of times and cannot compete on price with online retailers that take advantage of *Quill*'s artificial competitive imbalance.

In light of the characteristics of the bookselling industry, *Quill* has a particularly deleterious effect on independent bookstores. Books are the exact sort of product that customers would buy using an app in order to save money on sales tax. First, books are extremely easy to find on the Internet. Second, books purchased

online are perfect substitutes for books purchased in stores. Third, consumers who purchase books online are charged nothing for shipping, or, at most, a minimal amount. Fourth, customers rarely mind the delay in receiving a book shipped to them by an online retailer. Fifth, online retailers often sell books below cost, making it even more difficult for independent bookstores to compete. As a result of these factors, *Quill* poses an existential threat to independent bookstores.

The Court should not wait for Congress to act—multiple bills have been introduced that would overrule *Quill*, but all the bills have stalled. Nor should the Court leave this issue to state governments—state statutes intended to mitigate *Quill*'s effects have yielded unintended consequences. Federal action is required, and that federal action should come from this Court.

ARGUMENT

ABA agrees fully with all of the legal and practical arguments in South Dakota's petition for certiorari. As South Dakota persuasively explains, *Quill*'s physical-presence rule is indefensible from both a doctrinal and practical perspective. Doctrinally, *Quill* is inconsistent with decades of this Court's dormant commerce clause jurisprudence: a "precedential island [] ... surrounded by a sea of contrary law." Pet. 3 (quoting *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring)). Practically, *Quill* harms both local governments and bricks-and-mortar businesses, and results in inefficient allocation of resources and economic waste. Pet. 12-20. ABA also agrees that *stare decisis* considerations do not warrant retaining *Quill*, in

view of the drastically changed circumstances since *Quill* was decided. Pet. 27-35.

ABA submits this brief to emphasize the harmful effects of *Quill* on independent bookstores. Given that virtually any product can be purchased online today, virtually all retailers are adversely affected by *Quill*. But *Quill* is particularly harmful to independent booksellers, in view of the unique characteristics of the bookselling industry that create an incentive for customers to buy books online as a way of avoiding sales tax. Put simply, the artificial competitive imbalance created by *Quill* is an existential threat to many independent booksellers. The Court should grant certiorari and overrule *Quill*.

I. *Quill* is an Existential Threat to Independent Bookstores.

ABA's bookstore members are independent businesses that are pillars of their communities' local economy and culture. For generations, independent bookstores have brought books to young and old. Independent bookstore owners carefully curate books, choosing titles of greatest interest and relevance to their local communities. Their staff provide invaluable assistance to their customers, listening to their interests and suggesting books they might find appealing. And independent bookstores provide more than just books. They also offer events, such as book signings and storytelling for young children, that support local authors and promote literacy in their communities.

To survive, independent bookstores must sell books. And for generations, independent bookstores have sold

books and thrived. Customers who came to independent bookstores to browse for books would buy them, thus supporting thousands of independent bookstores across the United States.

Even in the age of e-commerce, entrepreneurs continue to open and expand independent bookstores. There has been a 35 percent increase in the number of independent bookstore locations since 2009. Existing stores are opening in new locations, and established stores are being successfully sold to new owners, often younger owners as a new generation of booksellers enters the industry. Book sales have also increased for the past four years, including an eight percent increase in 2015.

But all is not rosy. As smartphones became increasingly ubiquitous, and as readers quickly became more accustomed to buying products online, this Court's decision in *Quill* has posed, and continues to pose, a threat to independent bookstores. With the advent of smartphones, many customers soon realized that, instead of buying a book from an independent bookstore and paying tax, they could buy the same book from an online retailer using their smartphones and avoid paying tax. As a result of this imbalance—which is entirely a product of this Court's decision in *Quill*—online retailers that do not collect and remit sales tax for in-state purchases have a significant competitive advantage, which customers have exploited to the detriment of independent bookstores.

Of course, the widespread belief that it is *legal* to purchase products online without paying sales tax is wrong. As South Dakota explains, the tax is still owed

as a use tax; *Quill* merely prevents the State from making the online service collect the tax. Pet. 28. Yet despite their best efforts, it is notoriously difficult for state revenue departments to collect use taxes from people who purchase products online. As such, online services obtain their competitive advantage by facilitating widespread tax evasion.

The practice of checking the price of a book or other retail item (as many independent bookstores offer a wide array of ancillary products) in a store and then buying it on a smartphone became so common it even spurred the creation of a new verb: "showrooming." In an environment where online retailers do not collect sales tax, a customer comes to a bookstore. He browses books that were carefully curated by the bookstore owner. He receives advice from store staff and enjoys a cup of coffee at the store's expense. His children enjoy a storytelling session. But after choosing the books he or his children want to read, he does not buy them from the bookstore. Instead, to save money, he pulls out his smartphone and buys his books from an online store, such as those operated by Respondents. Thus, the bookstore is transformed into a "showroom"—where customers can decide what books they want, so they can buy them more cheaply from an online seller.

When *Quill* was decided in 1992, this problem barely existed. Mail-order booksellers did exist in 1992, but purchasing books from such booksellers was cumbersome. A customer wishing to avoid sales tax would have had to write down the names of the books he wanted, using pencil and paper, and then go home and telephone mail-order booksellers until he found one or

more booksellers who had the books in stock. Moreover, the customer would potentially face shipping costs that exceeded the sales tax saved, especially if no single bookseller carried all the books that the customer wanted to buy. Few customers would jump through those hoops; most would simply buy the books from the bookstore.

Circumstances have changed. Today, it literally can be faster to purchase books from a smartphone app than to wait in line for the cash register. Many such apps store the user's address and credit card number; thus, searching for a book and ordering it can take 30 seconds or less. Further, "free shipping" from online stores is ubiquitous—and it is trivially easy to verify that the cost of purchasing a book online, tax-free, is lower than the cost of purchasing a book from a retail store and paying sales tax. From the customer's perspective, therefore, there are two, equally easy options for buying a book: buy it from the store, and pay tax, or buy it online, and not pay tax. It is hardly surprising that customers choose the latter option—and hardly surprising that independent bookstores have suffered as a result.

Of course, retail bookstores can lower prices, or offer to cover the cost of sales tax, so as to compete with online sellers. But that simply moves them from the frying pan into the fire. Margins for book sales are notoriously low—in the experience of ABA's members, bottom-line profitability is often no more than two percent. And sales taxes can be very high—in some jurisdictions, 10 percent or higher. Independent bookstores cannot lower their prices by this amount, and still stay in business.

To be clear, ABA is not opposed to online booksellers and does not support any legal obstacles that would inhibit their growth. To the contrary, ABA is a staunch literacy advocate and supports all efforts to bring books to readers. In this spirit, ABA recognizes the important contributions of online booksellers, which allow everyone with an Internet connection—including people in rural or underpopulated areas who do not have access to a local bookstore—to access an almost unlimited array of books. Indeed, most ABA member bookstores have an online presence, and hundreds of ABA member bookstores sell books online. Further, ABA believes that a diverse array of options for buying books is healthy, and welcomes competition in the bookselling market.

But that competition should be fair. Under *Quill*, it is not. *Quill* artificially tilts the playing field by giving online booksellers an arbitrary advantage that they emphatically do not need.

Most importantly, even if bookstores' online competitors were to suddenly collect and remit sales tax in the 45 states that have sales tax, that still would not be an appropriate solution. Given the realities of retailing in the 21st century, if *Quill* is not overturned, it is inevitable that some future retailer will use this 1992 decision to gain a significant and unfair advantage over their bricks-and-mortar competitors.

The Court should overrule this unfair rule and ensure that ordinary market forces—not government-imposed tax arbitrage—determines who wins and who loses in the bookselling market.

II. The Particular Characteristics of Bookstores Make Them Uniquely Vulnerable to *Quill*'s Discriminatory Treatment.

Today, virtually anything can be bought online. As such, *Quill* adversely affects virtually all bricks-and-mortar retailers. But several characteristics of the bookselling market make *Quill* uniquely harmful to independent bookstores.

First, unlike items such as antiques or artworks, books are trivially easy to find on the Internet. In most cases, a simple search for the title and author will pull up the book immediately. Indeed, with modern apps, buying a book using an app is just as easy as buying the book at a physical bookstore's cash register. Thus, even if buying a book online will save only a few dollars in sales tax relative to buying the book from the store, customers will buy the book online—just as if two products were on a store shelf next to each other, one discounted and one at full price, the customer would naturally choose the discounted option.

Second, a book from an online bookstore is a perfect substitute for a book from retail bookstores. The words on each page will be identical no matter who sells the book. As a result, the difference in sales tax may be the decisive factor in where the customer buys the book.

Third, books are small enough that shipping costs are typically less than the cost of sales tax—and often zero. Almost invariably, the shipping costs will be lower than the sales tax saved, thus creating the incentive to buy the book online.

Fourth, books are the type of product for which a customer may be willing to endure the modest delay associated with buying online. Books are unlike goods such as candy bars, which are typically purchased for immediate consumption. People often read books slowly and are willing to wait a few days to obtain them, if the short delay will allow them to save money on sales tax.

Fifth, large online retailers have historically used books as "loss leaders" to persuade book-buyers to come to their sites and purchase other, more expensive items or services. *See* Xinxin Li et al., *Price Dispersion and Loss-Leader Pricing: Evidence from the Online Book Industry*, 59 Mgmt. Sci. 1290 (2013), https://www.researchgate.net/publication/256030627_Price_Dispersion_and_Loss_Leader_Pricing_Evidence_from_the_Online_Book_Industry. As such, bricks-and-mortar retail bookstores already have difficulty competing on price with online retailers. They are thus uniquely vulnerable to the additional competitive harm that results from *Quill*.

As a result, bookstores—more than virtually every other type of retail store—have been negatively impacted by *Quill*. Moreover, as smartphones become more efficient and as buying books from Respondents and other online stores becomes easier, the problem will get even worse. Overruling *Quill* is necessary to ensure that booksellers can compete on a level playing field—and survive.

III. Individual Booksellers' Experiences Confirm *Quill*'s Negative Effect On Independent Bookstores.

Quill harms real booksellers in the real world. Below, ABA presents the testimonials of four booksellers who have been harmed by *Quill* and whose livelihoods may depend on this case.

Bradley Graham, the co-owner of Politics & Prose, in Washington, D.C., has been the victim of the notorious "showrooming" phenomenon:

> One of our biggest concerns at Politics & Prose is showrooming—that is, customers who come into the store, avail themselves of our staff's expertise and recommendations, then leave without buying but instead end up ordering their books online. We regularly see customers using their phone cameras to take pictures of books on our shelves without purchasing those books in the store; very likely, they turn to the web to buy.

Liza Bernard, the co-owner of The Norwich Bookstore, in Norwich, Vermont, similarly describes the harmful effects of *Quill*:

> The Norwich Bookstore has been struggling to level the playing field for years, both on the state and federal level, and we have discovered that the regulations must be nationwide to have any real affect.
>
> Running a retail store in a town that borders a state with no sales tax, we are acutely aware of the 6 percent we collect for Vermont. If we

> purchase from a New Hampshire store and they deliver to us in Vermont, they are required to collect and remit the Vermont sales tax. If we purchase online, for delivery via carrier to the store or the post office, oftentimes the tax is not collected. This favoritism of the giant online retailers directly hurts the business we have worked over 20 years to build. Customers visit the bookstore and then order online to "save" the 6 percent sales tax and pick up their purchase next door at the post office! Not only do we collect the sales tax, we employ our neighbors, support local schools and non-profits, and pay property taxes.
>
> Fair and equitable sales tax collection honors the contribution of local, bricks-and-mortar retail business.

Becky Anderson, the co-owner of Anderson's Bookshops in Naperville, Illinois; Anderson's Toyshop in Downers Grove, Illinois; and Anderson's Bookfair Company in Aurora, Illinois, describes the harm of *Quill* on booksellers and the local community:

> I am a fifth-generation independent small-business owner. Our family has been in business for 142 years in Naperville, Illinois, with a large pharmacy, three retail bookshops, a toyshop, and a large educational book company. We are in four suburbs of the Chicagoland area. We have been collecting sales tax for every taxable item since sales tax was first introduced in our state. That's a lot of support for local, county, and statewide services and general funds. But as soon as the

stores in the cloud starting selling direct to our neighbors and fellow community members we were at a huge disadvantage. Not only were bricks-and-mortar stores losing sales, we were losing sales tax revenue on every item sold from the store in the cloud that could have been sold at a bricks-and-mortar location that we run, but also for thousands of bricks-and-mortar physical locations on the ground. No sales tax was being collected for years; an enormous loss for the state and local communities.

On the ground are stores like mine, paying property taxes, employing locally, circulating dollars in our community, increasing the social capital of our communities by donations, civic involvement, and building a community -- a Main Street.

As more and more empty storefronts appear around the country, our communities are losing out on all of the above. Proving nexus is just not enough. Just because a Cloud retailer has a location in a particular state does not mean they are paying the total tax in a particular community as all of us bricks-and-mortars do. In Illinois, companies like Amazon are only collecting 6 percent, which is the state tax and nothing is coming to local communities, especially those with home-rule sales tax. We were at a 7.5 to 10 percent disadvantage in the communities where we are located. But even after Amazon built warehouses in Illinois we are still at a 1.5 to 4 percent disadvantage.

> A national solution is necessary to ensure that the Cloud stores that do business in every community in this country pay the local rate of sales tax. In Illinois they have just instituted a fee for every community that collects sales tax – a 2 percent fee. Again, local communities are losing out. It would help so much to have Cloud stores collect the full sales tax based on where the sale originated, from the resident who lives in communities like mine.

Robert Sindelar, the managing partner of Third Place Books, in Lake Forest Park, Washington—and ABA's President—explains that he welcomes fair competition with online providers, so long as competition is on a fair playing field:

> As e-commerce grew in popularity from 2000 on, more and more I heard from my fellow booksellers how the outdated *Quill* decision was negatively impacting their stores. For me, it is easy to correlate the struggles of independent bookstores in other states with this sales tax inequity because, ironically, we never had this issue in our state. Amazon is the largest competitor for independent bookstores nationwide, but being headquartered in Washington State, Amazon has always collected and remitted sales tax to the state. Struggles that ABA member bookstores in other states had with sales tax inequity, such as showrooming (tapping a booksellers' brain for that great book and then going online to buy it at Amazon to avoid paying sales tax), were never much of an issue with us in

> Washington State. Indeed, that Seattle itself, the home of Amazon, has close to 20 independent bookstores in the greater Seattle area (much higher per capita than most parts of the country) is one example of how in a fair tax world, e-retailers and bricks-and-mortar can co-exist. This clearly points out that this inequity has a significant and negative impact on stores where remote retailers that compete with bookstores do not collect and remit. This is an inequity that indie bookstores -- and indeed all Main Street retailers -- have done well to overcome, to be sure, but one that they should never have had to face. This is an issue that should be corrected before the next big online retailer hits the market and tries to take advantage of this loophole -- a loophole created by a 1992 decision that made sense prior to the age of e-commerce, but one that needs to be rewritten for retail in the 21st century.

The Court should heed these voices and reconsider the anachronistic and harmful *Quill* rule.

IV. This Court Should Act, Because Congress Has Not.

This Court should not await action from Congress or state governments. It should grant certiorari and overrule *Quill* without delay.

ABA has tried for years to persuade Congress to enact legislation overruling *Quill*, without success. As early as 2000, ABA and other booksellers began making the case to Congress that overruling *Quill* was necessary to ensure a level playing field in retail. Since

then, members of Congress have frequently introduced legislation to overrule *Quill*, but those bills have invariably failed without reaching a vote.

For instance, in 2003, Republican and Democratic members of Congress jointly introduced legislation in both the House and the Senate that would allow states to simplify sales tax, with equal tax treatment between local merchants and remote sellers. *See* H.R. 3184, 108th Cong. (2003); S. 1736, 108th Cong. (2003) (Streamlined Sales and Use Tax Act). But that bill failed to come to a vote.

In 2010, Congress once again took up the sales tax fairness mantle in an effort to pass federal legislation. The proposed bill, the Main Street Fairness Act (H.R. 5660, 111th Cong. (2010)), would have authorized states to require remote retailers to collect and remit sales tax on orders in their states. As Representative Delahunt, who introduced the bill, explained, the bill was "designed to help states retrieve billions in sales tax revenues that are owed but currently going uncollected while providing long overdue relief to Main Street businesses by restoring fairness and competition to the marketplace." Two years later, the Senate convened a committee hearing to address another proposed bill, S. 1832, 112th Cong. (2011) which would have overruled *Quill*. Yet neither bill was successful.

The ABA has also lobbied states to enact legislation to mitigate the effects of *Quill*. In response, New York and several other states have enacted "affiliate nexus" laws, which imposed sales tax collection obligations on out-of-state retailers with online affiliates in the States. But that legislation has yielded unintended

consequences: Remote retailers took the harsh tactic of firing their online sales affiliate in states that had passed affiliate nexus laws. This draconian tactic by remote retailers made it clear exactly how important the inequity afforded by the outdated *Quill* decision was to their business model. It also made clear that there is no adequate substitute for a *federal* decision overruling *Quill*.

This Court created the outdated and detrimental *Quill* rule, and it is time for the Court to step in and overrule it.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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